

This Opinion is Not a  
Precedent of the TTAB

Hearing: March 22, 2023

Mailed: August 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Exhart Environmental Systems, Inc.*

Serial No. 90006864

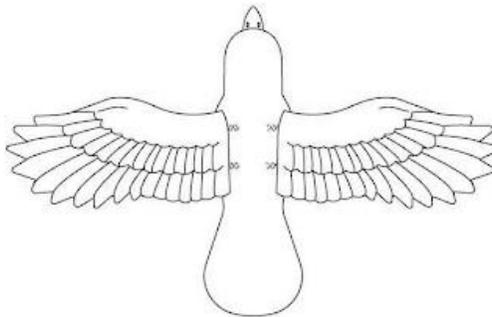
Daniel M. Cislo and Kristin B. Kosinski of Cislo & Thomas LLP  
for Exhart Environmental Systems, Inc.

Bridget Watson, Trademark Examining Attorney, Law Office 128,  
Travis Wheatley, Managing Attorney.

Before Cataldo, Adlin and Lynch, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Exhart Environmental Systems, Inc. seeks a Principal Register registration under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f), for the proposed product configuration mark shown below



for “non-metal garden stakes sold wholesale; decorative garden accessories, namely, figurines of plastic sold wholesale,” in International Class 20.<sup>1</sup> The Examining Attorney refused registration of the proposed mark under Sections 1, 2 and 45 of the Act, 15 U.S.C. §§ 1051, 1052 and 1127, on the ground that it consists of non-distinctive product design, and Applicant’s showing of acquired distinctiveness under Section 2(f) is insufficient. When the refusal became final, Applicant appealed and filed a request for reconsideration that was denied. The appeal is fully briefed, and Applicant and the Examining Attorney participated in an oral hearing.

### **I. Applicant’s “Heavy” Burden to Establish Acquired Distinctiveness**

The only issue in this appeal is whether the proposed mark has acquired distinctiveness. In fact,

[i]n the case of product design, as in the case of color, we think consumer predisposition to equate the [claimed] feature with the source does not exist. Consumers are aware of the reality that, almost invariably, even the most unusual of product designs – such as a cocktail shaker shaped like a penguin – is intended not to identify the source, but to render the product itself more useful or more appealing.

*Walmart Stores, Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1069 (2000). Thus, product configurations such as Applicant’s proposed mark in this case “are entitled to registration on the Principal Register only upon a showing of acquired distinctiveness under Section 2(f).” *In re Ennco Display Systems, Inc.*, 56 USPQ2d

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<sup>1</sup> Application Serial No. 90006864, filed June 17, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on first use dates of February 1, 1999. The application includes this description of the mark: “The mark consists of a three-dimensional configuration of a non-metal garden stake in the shape of a songbird.”

1279, 1282-83 (TTAB 2000); *see also*, *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1554 (TTAB 2009) (“Configurations of products are not inherently distinctive and may only be registered as marks upon a showing of acquired distinctiveness.”).

Applicant bears the burden of establishing that its proposed mark has acquired distinctiveness under Section 2(f) of the Act. *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005). Because consumers are not predisposed to associate a product’s design with its source, and “should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves,” *Walmart Stores*, 54 USPQ2d at 1069, it should not be surprising that Applicant’s burden to establish the requisite acquired distinctiveness “is heavier in this case because it involves product configurations.” *In re Ennco*, 56 USPQ2d at 1284; *see also*, *Yamaha Intern. Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988) (party seeking to establish acquired distinctiveness of product design bears “unusually heavy burden”).

In assessing whether Applicant has met its heavy burden of establishing acquired distinctiveness, we consider any evidence bearing on: “(1) association of the trade[mark] with a particular source by actual purchasers (typically measured by customer surveys); (2) length, degree, and exclusivity of use; (3) amount and manner of advertising; (4) amount of sales and number of customers; (5) intentional copying; and (6) unsolicited media coverage of the product embodying the mark.” *In re*

*Snowizard, Inc.*, 129 USPQ2d 1001, 1005 (TTAB 2018) (quoting *Converse, Inc. v. Int'l Trade Comm'n*, 907 F.3d 1361, 128 USPQ2d 1538, 1546 (Fed. Cir. 2018)).

## II. Applicant's Evidence of Acquired Distinctiveness

Applicant's specimen, reproduced below, depicts Applicant's garden stakes in the shape of a songbird, as well as garden stakes in the shapes of butterflies and dragonflies:



As shown, all of the garden stakes depicted, including those in the shape of songbirds or hummingbirds, are called “WindyWings,” an apparent reference to what the specimen describes as Applicant’s “patented ‘springed’ wings,” and what Applicant’s “Executive Chief Executive Officer” Michael Weiser refers to as “moveable wings.” July 6, 2022 Request for Reconsideration TSDR 53-54<sup>2</sup> (Declaration of Michael Weiser ¶¶ 4-6).<sup>3</sup> Applicant promotes the “movable wings” feature with “look for” advertising (literally), as shown below:



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<sup>2</sup> Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, by page number, in the downloadable .pdf format.

<sup>3</sup> The Weiser Declaration is dated December 1, 2021, and was apparently intended to be filed with Applicant’s December 10, 2021 Office Action response, but appears in the record only as part of Applicant’s July 6, 2022 Request for Reconsideration.

In any event, Applicant has been using the proposed mark since 1999, and has spent “over \$50,000 on advertising products bearing the applied-for design per year since 2000.” January 20, 2021 Office Action response TSDR 18 (Declaration of Margaret Weiser, Applicant’s Vice President ¶¶ 4-5). The product is quite successful, with sales exceeding \$10 million “overall.” *Id.* (Margaret Weiser Dec. ¶ 8). Moreover, “Applicant has enforced its mark against several third party sellers that have copied the applied-for design or created similar versions thereof.” *Id.* (Margaret Weiser Dec. ¶ 9). These sellers include “a large, nationwide gift and home goods retail company, a large, nationwide big box hardware store, two large nationwide pharmaceutical stores with many brick and mortar locations, a variety store, and at least two well-known gift and garden wholesalers.” July 6, 2022 Request for Reconsideration TSDR 54 (Michael Weiser Dec. ¶ 9).

Two “buyers” of Applicant’s identified goods – Fleet Farm and Stein’s Garden & Home – submitted letters in support of the involved application. *Id.* at 68, 73. Both vendors of the product indicate that they have been purchasing WindyWings products for many years, and that they associate the products’ “flexible wings” with Applicant. *Id.* Both companies list WindyWings products on their websites, with Fleet Farm highlighting the products’ “springed wing design” and Stein’s highlighting the products’ “wings that move up and down to simulate flight when a breeze is blowing.” *Id.* at 70, 75. Similarly, Home Depot’s, Amazon’s, Loew’s and Target’s online listings for Applicant’s goods highlight that WindyWings garden stakes “flutter in the breeze,” simulating flight and adding “lovely motion” or “gentle movement.” *Id.* at 25,

31, 41, 49 (Declaration of Kristin B. Kosinski, Applicant’s attorney Exs. B-E). A few online reviews at these websites also mention the products’ flexible wings.

According to Mr. Weiser, Applicant’s advertising “emphasizes the **image** of the product only and stresses the movable wings and shape of the product on its advertisements and point-of-sale displays.” *Id.* at 54 (Michael Weiser Dec. ¶ 6) (emphasis in original). Mr. Weiser testifies that as a result of Applicant’s “image advertising and promotion, consumers have come to associate the applied-for design with” Applicant. *Id.* (Michael Weiser Dec. ¶ 7).

### **III. Applicant Has Not Established that the Proposed Mark Has Acquired Distinctiveness**

Mr. Weiser’s testimony highlights perhaps the two most fundamental problems with Applicant’s evidence: (1) it focuses on the garden stakes’ “flexible wings,” even though Applicant does not seek protection for the product’s “movable” or “flexible” wings; and (2) Applicant’s purported advertising “emphasis” on images of the product does not inform consumers that the product’s configuration/design is a mark.

As for the flexible wings, they are not identified, depicted or claimed as such in



the involved application. Rather, the application’s drawing ( ) shows what appear to be stationary wings, while the application’s description of the mark and identification of goods do not mention wings at all. Nothing in the drawing of the mark or its description indicates that the wings are flexible or intended to move. Thus, even if Applicant had established consumer recognition of the product’s “flexible wings,” that would not by itself support registration of “a three-dimensional

configuration of a non-metal garden stake in the shape of a songbird” or “decorative garden accessories, namely, figurines of plastic sold wholesale.” Applicant would have had to show instead that consumers associate “the shape of a songbird” (as depicted in the application’s drawing) with Applicant, and it failed to do so. *In re OEP Ent., Inc.*, 2019 USPQ2d 309323, at \*16-17 (TTAB 2019) (rejecting claim of acquired distinctiveness, stating “[i]n the product design context, evidence of acquired distinctiveness ‘must relate to the promotion and recognition of the specific configuration embodied in the applied-for mark and not to the goods in general ... Applicant does not address the other elements of the applied-for mark, or claim that the mark as a whole has acquired distinctiveness.’”) (citations omitted); *In re Change Wind Corp.*, 123 USPQ2d 1453, 1467 (TTAB 2017) (“The evidence must relate to the promotion and recognition of the specific configuration embodied in the applied-for mark and not to the goods in general.”) (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 214 USPQ 1, 4 n.11) (1982)); *In re Koninklijke Philips Elec. N.V.*, 112 USPQ2d 1177, 1180 (TTAB 2014). Applicant’s claim that it stresses the “shape of the product” in advertising, July 6, 2022 Request for Reconsideration TSDR 54 (Michael Weiser Dec. ¶ 6), is belied by the record.

Because Applicant does not seek a registration covering “flexible wings,” Applicant’s advertising instructing consumers to “look for the flexible wings” does not show that the mark Applicant seeks to register has acquired distinctiveness. Furthermore, “the record contains no evidence regarding how widely this ‘look for’ advertising was disseminated, how many consumers may have been exposed to it, or

its effectiveness in indoctrinating consumers to view the design as an indicator of source.” *In re Change Wind*, 123 USPQ2d at 1468. Here, as we have pointed out in the past, “advertising that touts a product feature for its desirable qualities and not primarily as a way to distinguish the producer's brand is not only not evidence that the feature has acquired secondary meaning, it directly undermines such a finding.” *In re Ennco*, 56 USPQ2d at 1285 (quoting *Thomas and Betts Corp. v. Panduit Corp.*, 65 F.3d 654, 36 USPQ2d 1065, 1071-72 (7<sup>th</sup> Cir. 1995)).

As for Applicant’s emphasis on product images in its advertising and promotion, that is not enough by itself. *In re OEP*, 2019 USPQ2d at \*23 (rejecting claim of acquired distinctiveness where advertisements “do nothing to encourage readers to associate the shape of the umbrella with Applicant”); *Stuart Spector Designs*, 94 USPQ2d at 1572 (“advertisements must show promotion of the configuration as a trademark”). Furthermore, as revealed in Applicant’s specimen, as well as the Stein’s, Fleet Farm, Loew’s, Amazon and Home Depot product listings, and a YouTube clip from QVC, the product is clearly referred to as “WindyWings,” a literal mark in which the capital “W”’s signal, and the surrounding context indicates, that the product’s name/mark is “WindyWings.” July 6, 2022 Request for Reconsideration TSDR 23, 25, 31, 41, 70, 75. *In re Mogen David Wine Corp.*, 372 F.2d 539, 152 USPQ 593, 595 (Fed. Cir. 1967) (“While a decanter bottle of wine is featured, there is nothing to indicate that the container has been promoted separate and apart from the word mark ‘MOGEN DAVID.’ We are unable to find a single reference to the container itself.”); *In re The Ride, LLC*, 2020 USPQ2d 39644, at \*10 (TTAB 2020) (“The proposed [tap

dancing motion] mark is not Applicant's main identifier of the source of the services (THE RIDE is) ... and consumers would not be pre-disposed to view the tap dance as a mark."); *In re Edward Ski Prods. Inc.*, 49 USPQ2d 2001, 2005 (TTAB 1999) ("only the word mark THE MASQUE has been used in the manner of a trademark"). Nowhere do Applicant's specimen or the product listings of record inform consumers that the product's configuration is a source identifier. Based on the specimen and other promotional material, we find that consumers would focus on other matter for source indication and would not perceive the product design as a source indicator. This weighs against Applicant's claim of acquired distinctiveness. *Stuart Spector Designs*, 94 USPQ2d at 1572.

Applicant's remaining evidence of acquired distinctiveness also falls short. Here, as in a number of analogous product configuration cases, Applicant's long-term use of the proposed mark is not sufficient to prove acquired distinctiveness. *In re Change Wind*, 123 USPQ2d at 1468; *In re Koninklijke Philips*, 112 USPQ2d at 1186 (for product designs, "evidence of five years' use considered alone is generally not sufficient to show acquired distinctiveness"); *Stuart Spector Designs*, 94 USPQ2d at 1554 ("even long periods of substantially exclusive use may not be sufficient to demonstrate acquired distinctiveness" for product configurations).

Nor is the sales success WindyWings has enjoyed persuasive. *In re Change Wind*, 123 USPQ2d at 1468; *Kohler Co. v. Honda Giken Kogyo K.K.*, 125 USPQ2d 1468, 1516 (TTAB 2017) ("while sales volume figures may demonstrate the growing popularity of the products, mere figures demonstrating successful product sales are not

probative of purchaser recognition of a configuration as an indication of source”) (quoting *Stuart Spector Designs*, 94 USPQ2d at 1572); *In re ic! berlin brillen GmbH*, 85 USPQ2d 2021, 2024 (TTAB 2008) (“it is well settled that even compelling sales and advertising figures do not always amount to a finding of distinctiveness” in product configuration cases). The years of use and sales reflect the popularity of the product, but, given the record as a whole, do not persuade us that consumers view the product configuration as a mark.

Applicant’s evidence regarding its enforcement efforts and the alleged copying of Applicant’s configuration fail to establish secondary meaning for two reasons. First, “[c]opying is only evidence of secondary meaning if the defendant’s intent in copying is to confuse consumers and pass off his product as the plaintiff’s.” *Stuart Spector Designs*, 94 USPQ2d at 1575 (quoting *Thomas and Betts*, 36 USPQ2d at 1072); *In re Ennco*, 56 USPQ2d at 1286. Applicant provided only conclusory statements from its own officers regarding the alleged copying, and we cannot infer the requisite intent therefrom. Second, we would require “more information regarding the disputes, such as copies of demand letters and responses, and settlement agreements” for this evidence to be persuasive. *In re OEP*, 2019 USPQ2d at \*26; *In re Ennco*, 56 USPQ2d at 1286.

Finally, the Fleet Farm and Stein’s letters indicating that these retailers associate the product’s “flexible wings” with Applicant would be of little help even if they addressed the product configuration for which Applicant seeks registration, which they do not. “It is well settled that the assertions of retailers, who know full well from

whom they are buying, that they themselves recognize a particular designation as a trademark, or that they believe that their customers consider it to be a mark, cannot serve to establish that members of the purchasing public, who come to the marketplace without such specialized knowledge, would in fact recognize the designation as an indication of origin.” *Stuart Spector Designs*, 94 USPQ2d at 1575 (quoting *In re Semel*, 189 USPQ 285, 288 (TTAB 1975)). See also *In re ic! berlin brillen*, 85 USPQ2d at 2024 (“the statements of ten retailers do not establish an association of the earpiece design with applicant by other than an extremely small number of the purchasing public”).

#### **IV. Conclusion**

Considering the record in its entirety under the *Converse* factors, we find that consumers do not recognize Applicant’s proposed product configuration mark as a source indicator for the identified goods. Thus, Applicant has not met its heavy burden to establish that its product configuration has acquired distinctiveness, and we therefore affirm the refusal to register. Applicant’s proposed mark is non-distinctive product design.

**Decision:** The refusal to register Applicant’s proposed mark under Sections 1, 2 and 45 of the Trademark Act is affirmed.